

NOT DESIGNATED FOR PUBLICATION

DIVISION I

**ARKANSAS COURT OF APPEALS**

No. CACR 07-676

KENDALL CAMPBELL,

APPELLANT,

VS.

STATE OF ARKANSAS,

APPELLEE,

Opinion Delivered FEBRUARY 13, 2008

APPEAL FROM THE PULASKI  
COUNTY CIRCUIT COURT,  
[NO. CR-06-1697]

HON. BARRY SIMS, JUDGE,

AFFIRMED

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**JOHN MAUZY PITTMAN, Chief Judge**

The appellant was charged with first-degree murder. After a jury trial, he was found guilty of second-degree murder and sentenced to thirty years' imprisonment. On appeal, he argues that the trial court erred in denying his motion for a mistrial. We affirm.

Mistrial is a drastic recourse and should be ordered only when the fundamental fairness of the trial itself has been manifestly affected; a mistrial is to be granted only where any possible prejudice cannot be removed by an admonition to the jury. *Furlough v. State*, 314 Ark. 146, 861 S.W.2d 297 (1993). There is no such prejudice in this case.

Appellant asserts that a witness testified that appellant admitted shooting the victim, and that his motion for a mistrial on this ground was improperly denied. We do not agree. First, despite appellant's assertions to the contrary, it is far from clear that the witness did

in fact testify that appellant admitted the shooting. The witness in question, Ms. Alexis Sills, was called by the State and was declared to be a hostile witness by the trial judge. The following colloquy then ensued:

ALEXIS SILLS: I did see nobody with a gun. . . . I'm telling the truth. I'm not fixing to make up nothing.

PROSECUTING ATTORNEY: Did you not say at one point . . .

ALEXIS SILLS: Oh, man.

PROSECUTING ATTORNEY: . . . that when you told the police that you were inside during the shooting, just like you testified here today, that that was a lie? That you were actually out there and saw [appellant] shooting at the LTD?

ALEXIS SILLS: Man, I'm telling the truth, the whole truth, and nothing but the truth.

. . . .

PROSECUTING ATTORNEY: Who is this?

ALEXIS SILLS: I don't want to see that, man. Real talk. I don't want to see that, man. Dude, I don't want to see that. Dude, I don't want to that. Real. I don't want to see that. Man, I'm whatever, whatever.

PROSECUTING ATTORNEY: Who is in that picture?

. . .

ALEXIS SILLS: I was inside the house. I heard Dude say, "Come up off that," and I had to go use the bathroom. I'm six-and-a-half months pregnant; I'm not going to piss on myself. I went inside the house. I went inside the house to use the bathroom and it didn't take me about twenty to thirty seconds to use the bathroom. I came back to the door and I was like about to go back outside and stand back on the block but I couldn't because it was gunshot. I heard a number of gunshot so I'm telling Terrell and the little kids to "Stay right there, stay right there. You know, they're shooting, get down, get

down.”

PROSECUTING ATTORNEY: Who’s shooting?

ALEXIS SILLS: I don’t know who was shooting; they was shooting.

PROSECUTING ATTORNEY: Who’s they?

ALEXIS SILLS: Dude, they admitted to it, didn’t he?

PROSECUTING ATTORNEY: [The appellant]?

ALEXIS SILLS: Shit, they did it, hell.

PROSECUTING ATTORNEY: [The appellant] was shooting?

ALEXIS SILLS: Shit.

PROSECUTING ATTORNEY: Is that right? You just pointed over here and...

ALEXIS SILLS: Fuck. You told me to tell the truth. Shit, I’m telling the truth.

[Trial court orders witness to calm down]

PROSECUTING ATTORNEY: You pointed over to this man and said he was shooting. Did you see him shooting?

ALEXIS SILLS: No, I didn’t see him shoot. Shit, they admitted to it so that’s who did it, shit.

PROSECUTING ATTORNEY: Okay. Who admitted to it?

ALEXIS SILLS: They did. Shit. That’s what the fuck I heard. They admitted to what they did.

PROSECUTING ATTORNEY: I don’t care what you heard.

ALEXIS SILLS: Dude didn’t have to show me that picture, man. That’s all I’m saying. Man, he didn’t have to show me that picture, man.

It is impossible, from this colloquy, to determine who it was that the witness was referring to when she testified that “they” admitted shooting. Furthermore, it appears from the record that the trial court did not believe that Ms. Sills identified appellant:

DEFENSE ATTORNEY: She said my client admitted to this. There’s nothing in there that he admitted to it at all. I mean, that’s highly prejudicial. I’m going to have to ask for a mistrial.

. . . .

THE COURT: Now, at this point in time, when she got emotional, she pointed over at him and said he was shooting.

DEFENSE ATTORNEY: She did not, she did not.

THE COURT: She said they were all shooting. She didn’t ID the...

DEFENSE ATTORNEY: She didn’t say he was shooting.

. . . .

THE COURT: Your motion for a mistrial is denied because I don’t think that’s the context where it came out that she’s talking about.

A trial court’s decision will be accepted as correct unless shown to be otherwise, and it is appellant’s burden to bring up a record sufficient to do so. *Young v. Young*, 316 Ark. 456, 872 S.W.2d 856 (1994). Here, appellant’s assignment of error is premised on his assertion that Ms. Sills testified that appellant admitted shooting the victim. Without regard to the merits of the legal argument advanced, appellant cannot prevail on appeal without demonstrating the truth of the factual assertion upon which his assignment of error is premised, and he has failed to do so in this case.

Even if appellant had shown that Ms. Sills testified that he admitted shooting the victim, we would not reverse because appellant pled justification as a defense, took the stand, and admitted shooting the victim; consequently, even had an error occurred, it would be harmless under the facts of this case. *See Isbell v. State*, 326 Ark. 17, 931 S.W.2d 74 (1996); *Blevins v State*, 95 Ark. App. 218, \_\_\_ S.W.3d \_\_\_ (2006); *Coon v. State*, 76 Ark. App. 250, 65 S.W.3d 889 (2001); *Pool v. State*, 29 Ark. App. 234, 780 S.W.2d 350 (1989); *Barlow v. State*, 28 Ark. App. 21, 770 S.W.2d 186 (1989).

Affirmed.

GLADWIN and BAKER, JJ., agree.